IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-cv-329-GKF(PJC)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S RESPONSE IN OPPOSITION TO "DEFENDANTS' JOINT MOTION FOR PARTIAL SUMMARY ON PLAINTIFF'S DAMAGES CLAIMS PREEMPTED OR DISPLACED BY CERCLA [DKT #2031]"

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Plaintiff, the State of Oklahoma ("the State"), respectfully requests that "Defendants' Joint Motion for Partial Summary Judgment on Plaintiff's Damages Claims Preempted or Displaced by CERCLA [DKT #2031]" be denied in its entirety.

I. Introductory Statement

Relying upon *New Mexico v. General Electric Co.*, 467 F.3d 1223 (10th Cir. 2006), Defendants' Motion seeks summary judgment that CERCLA (1) preempts the State's damages claims under state law nuisance (Count 4) and trespass (Count 6),[1] the State's claim for unjust enrichment, restitution and disgorgement (Count 10), and the State's demands for punitive and exemplary damages, and (2) displaces the State's entire claim under federal common law nuisance (Count 5). Defendants' Motion is simply a rehash of their earlier motion for judgment on the pleadings, *see* DKT #1004, and for similar reasons that that motion failed this latest Motion should fail as well.

First, Defendants' Motion fails because Defendants cannot carry their summary judgment burden of showing that CERCLA "actually and unquestionably" applies in the State's case -- an obvious prerequisite for there to be even any possibility for CERCLA preemption of the State's state law nuisance and trespass damages claims, unjust enrichment / restitution / disgorgement claim or punitive damages / exemplary damages claims or for CERCLA displacement of the State's federal common law nuisance claim. Defendants continue to deny that CERCLA applies in the State's case and, moreover, there has yet to be a judicial determination that each of the baseline elements of a CERCLA claim -- arranger liability, a release, a hazardous substance, and a facility -- has been met. It is axiomatic that if the statute under which a defendant is claiming preemption or displacement does not in fact apply, then there can be no preemption or

[1] Defendants do not contend that CERCLA preempts the State's injunctive claims for relief under Counts Four and Six.

displacement by that statute. Thus, given Defendants' denials as to the applicability of CERCLA, unless and until there is a judicial determination at trial that CERCLA applies,[2] the question of whether CERCLA preemption or displacement is triggered, and what the scope of that preemption or displacement might be, remains premature and inappropriate for summary judgment.

And second, Defendants' Motion fails because, even if the Court were to substantively apply *New Mexico* to the State's Second Amended Complaint ("SAC"), there are no grounds to support entry of summary judgment on the State's claims on the basis of preemption or displacement. *New Mexico* was limited to preemption of *the use of remedies*. It was not directed at preemption of *the claims themselves*. Further, Defendants have not come forward, as is their burden, with any evidence that there exists an "actual conflict" between the remedies sought in the State's claims and CERCLA, or that Congress intended CERCLA to occupy the field with respect to natural resource damages. Therefore, summary judgment is inappropriate.[3]

II. The State's Response to "Defendants' Statement of Undisputed Material Facts"

The State disputes "Defendants' Statement of Undisputed Material Facts" as follows:

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[2] The State specifies "at trial" because, as detailed below, there is at least one of the baseline elements of a CERCLA claim -- arranger liability -- that must await determination at trial as the parties (with the sole exception of the Cargill Defendants) did not move for summary judgment on this element. The Cargill Defendants' motion on this issue is, any event, without merit. *See* DKT #_____ (response to be filed June 5, 2009).

[3] Nothing herein should be construed as a concession by the State that *New Mexico* was correctly decided. In fact, the State submits that *New Mexico* incorrectly applied conflict preemption principles and the scope of the CERCLA savings clauses in reaching its holding. However, inasmuch as the State submits that even assuming arguendo that *New Mexico* were correctly decided and consideration of preemption were appropriate at this stage in the proceedings, CERCLA would neither preempt nor displace any of the State's claims or requests for damages.

1. Disputed. Dr. Fisher's testimony does not support the proposition for which it is cited. Dr. Fisher testified regarding his work as an expert in this case, indicating that the only contaminants of concern to him for injury were phosphorus and bacteria. Dr. Fisher did not testify that the State lacked evidence of any release or any injury from other contaminants. *See, e.g.,* Ex. 1 (Fisher Depo., p. 213 & 244) (using arsenic, zinc and copper in poultry waste to help demonstrate fate and transport). Mr. King's testimony does not support the proposition for which it is cited. The testimony cited by Defendants simply discusses the scope of work assigned to Mr. King. Mr. King's report on remediation options addresses injuries caused by phosphorus, nitrogen and bacteria and is not inclusive of all of the State's evidence of releases of contaminants or its injuries. *See* Ex. 2 (King Depo., pp. 89 & 214).

2. Disputed. Defendants mischaracterize and misconstrue the testimony of two of the State's experts, Dr. Fisher and Dr. King. The State has not refused to be bound by the testimony of these two experts and, although Defendants only reference these two experts in their statement of facts, the State has not refused to be bound by the testimony of any of its experts. The testimony of the State's experts is not inconsistent with the State's claims for response costs under CERCLA for arsenic, copper and zinc and the claim is supported by 30(b)(6) testimony and two affidavits from state employees. *See, e.g.,* Ex. 3 (Smithee Depo., pp. 23-26, 49 & 54-55); Ex. 6 to DKT #1913 (Duncan Decl.); Ex. 7 to DKT #1913 (Smithee Decl.). The State has not made any claim for response costs for nitrogen as a hazardous substance under CERCLA. While the State has substantial evidence supporting its claim for response costs under CERCLA resulting from the release of arsenic, copper and zinc, in the interest of streamlining this case, the State has made a determination that it will only pursue, under CERCLA, at trial (1) a claim for response costs, including all costs of removal and remedial action, incurred as the

result of the release or threatened release of phosphorus (including phosphorus compounds found in poultry waste) in the IRW and (2) a claim for natural resource damages for its injuries resulting from the release of phosphorus (including phosphorus compounds found in poultry waste) in the IRW.

III. The State's Counter-Statement of Undisputed Material Facts

The following undisputed material facts -- omitted from Defendants' Motion -- are relevant to resolution of Defendants' Motion:

1. Defendants deny that phosphorus (including phosphorus compounds found in poultry waste) is a "hazardous substance" within the meaning of CERCLA. *See* "Defendants' Joint Motion for Summary Judgment on Counts 1 and 2 of the Second Amended Complaint" [DKT #1872]; *see also* DKT #1236 (Peterson Answer to SAC, Aff. Def. #8 & Ans. ¶ 79); DKT #1237 (George's Defendants Answer to SAC, Ans. ¶¶ 79 & 149; DKT #1238 (Tyson Defendants Answer to SAC, Aff. Def. #41 & Ans. ¶ 79); DKT #1239 (Cal-Maine Defendants Answer to SAC, Ans., ¶ 79); DKT #1240 & #1241 (Cargill Defendants Answers to SAC, Aff. Def. #66 & Ans. ¶ 79); DKT #1243 (Simmons Answer to SAC, Aff. Def. #207 & Ans. ¶ 79).

2. Defendants deny that there has been a "release" within the meaning of CERCLA due to the alleged applicability of the "normal application of fertilizer" exception. *See* "Defendants' Joint Motion for Summary Judgment on Counts 1 and 2 of the Second Amended Complaint" [DKT #1872]; *see also* DKT #1236 (Peterson Answer to SAC, Aff. Def. #23 & Ans. ¶ 79); DKT #1237 (George's Defendants Answer to SAC, Ans. ¶¶ 79 & 150); DKT #1238 (Tyson Defendants Answer to SAC, Aff. Def. #2 & Ans. ¶ 79); DKT #1239 (Cal-Maine Defendants Answer to SAC, Aff. Def. #32 & Ans. ¶ 79); DKT #1240 & #1241 (Cargill

Defendants Answers to SAC, Aff. Def. #49 & Ans. ¶ 79); DKT #1243 (Simmons Answer to SAC, Aff. Def. #50 & Ans. ¶ 79).

3. Defendants deny being "arrangers" within the meaning of CERCLA. *See, e.g.*, DKT #1236 (Peterson Answer to SAC, Aff. Def. #67 & Ans. ¶ 82); DKT #1237 (George's Defendants Answer to SAC, Ans. ¶¶ 82 & 152); DKT #1238 (Tyson Defendants Answer to SAC, Aff. Def. #52 & Ans. ¶ 82); DKT #1239 (Cal-Maine Defendants Answer to SAC, Ans. ¶ 82); DKT #1240 & #1241 (Cargill Defendants Answers to SAC, Aff. Def. #66 & Ans. ¶ 82); DKT #1243 (Simmons Answer to SAC, Aff. Def. ## 152 & 161 & Ans. ¶ 82); DKT #2079 (Cargill Defendants' MSJ, pp. 18-21).

4. Defendants deny that the IRW, as well as the locations where poultry waste has been land applied and otherwise come to be located are "facilities" within the meaning of CERCLA. *See* "Defendants' Joint Motion for Summary Judgment on Counts 1 and 2 of the Second Amended Complaint" [DKT #1872]; *see also* DKT #1236 (Peterson Answer to SAC, Aff. Def. #17 & Ans. ¶ 80); DKT #1237 (George's Defendants Answer to SAC, Ans. ¶ 80); DKT #1238 (Tyson Defendants Answer to SAC, Aff. Def. #42 & Ans. ¶ 80); DKT #1239 (Cal-Maine Defendants Answer to SAC, Ans. ¶ 80); DKT #1240 & #1241 (Cargill Defendants Answers to SAC, Aff. Def. #66 & Ans. ¶ 80); DKT #1243 (Simmons Answer to SAC, Aff. Def. #208 & Ans. ¶ 80).

5. Defendants have cited no evidence in their moving papers that the State will use any natural resource damage recovery subject to CERCLA in a manner inconsistent with the requirements of 42 U.S.C. § 9607(f)(1).

IV. The Summary Judgment Standard

The summary judgment standard is well-established:

> Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When applying this standard, a court must examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *Wolf v. Prudential Insurance Co. of America*, 50 F.3d 793, 796 (10th Cir. 1995). The movant for summary judgment must meet the initial burden of showing the absence of a genuine issue of material fact, then the nonmovant bears the burden of pointing to specific facts in the record "showing a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." *Id.*

Lumpkin v. United States Recovery Systems, 2009 U.S. Dist. LEXIS 7578, *2-3 (N.D. Okla. Feb. 3, 2009) (Frizzell, J.).

V. Argument and Authorities

Defendants are moving for summary judgment on the State's claims for damages under Counts Four and Six (state law nuisance and trespass), its claim in Count Five (federal common law nuisance), its claim in Count Ten (unjust enrichment, restitution or disgorgement), and its request for punitive and exemplary damages. Defendants rely nearly exclusively upon the Tenth Circuit's decision in *New Mexico*, claiming that that decision mandates that such claims and / or claims for damages are preempted or displaced by CERCLA. The legal principles of *New Mexico* have no current application to this case, however, because, unlike *New Mexico* which involved a CERCLA Superfund site, the applicability of CERCLA to the present case has yet to be stipulated or adjudicated. At a minimum, until the threshold question of CERCLA's actual applicability is answered in the affirmative, the scope of CERCLA preemption and displacement, if any, may not be determined. Accordingly, Defendants' Motion must be denied in its entirety.

A. The *New Mexico* litigation

Given that Defendants, as they did in their earlier motion for judgment on the pleadings, rely almost exclusively on *New Mexico*, a review of that case at the outset is again appropriate.

The litigation in *New Mexico* centered on a groundwater contamination site in Albuquerque, New Mexico's South Valley. *See* 467 F.3d at 1226. Significantly, in 1983, EPA designated the site as a CERCLA Superfund site. *Id.* at 1227. For the 16 years prior to the commencement of the New Mexico Attorney General's lawsuit in *New Mexico*, the EPA and various state agencies had been engaged in a CERCLA remediation program to clean up this groundwater contamination. *Id.* This remediation program included the participation of those entities that eventually became defendants in the Attorney General's lawsuit. *Id.* at 1225 & 1235. Years after the remediation program had begun, the Attorney General brought the lawsuit, joining New Mexico's natural resource trustee as an involuntary party plaintiff, and seeking under state law public nuisance and negligence theories over a billion dollars for injuries outside the scope of the EPA remediation (*i.e.*, for an alleged, but unproven, deficiency in the EPA's chosen remedy). *New Mexico v. General Electric Co.*, 322 F.Supp.2d 1237, 1239 (D.N.M. 2004). During the litigation, New Mexico expressly acknowledged that any damage recovery would *not* be used to restore or repair damaged natural resources. *Id.* at 1259.[4] Following extensive discovery, the district court granted summary judgment against New Mexico for its failure to raise genuine issues of fact as to injury and damages. *Id.* at 1257.

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[4] The District Court explained:

> . . . [T]he State of New Mexico . . . proposed to stand idle and do nothing further to clean up toxic contamination beneath the South Valley Site that counsel insist will go untreated by the existing remedial actions. Instead, the State of New Mexico, by and through the Attorney General, sought to be paid billions of dollars in damages -- not to clean up the deep groundwater contamination they insist can be found beneath the South Valley Site, but to leave that contaminated water exactly as they allege it is, untreated and unusable, and to tie up an additional 200,000 acre-feet of otherwise usable water as a "buffer zone" intended to keep the contaminants from migrating towards active supply wells, and somehow to maintain that "buffer zone" for many, many years into the future.

New Mexico, 322 F.Supp.2d 1237, 1259 (D.N.M. 2004).

On appeal, the Tenth Circuit analyzed the scope of New Mexico's state law natural resource damages claim and CERCLA's preemptive effect on its requested remedies. The Court held: "CERCLA's comprehensive NRD scheme preempts any state *remedy* designed to achieve something other than the restoration, replacement, or acquisition of the equivalent of a contaminated natural resource. . . . The restrictions on the *use* of NRDs in § 9607(f)(1) represent Congress' considered judgment as to the best method of serving the public interest in addressing the cleanup of hazardous waste. . . . *This is not to say the State's public nuisance and negligence theories of recovery are completely preempted* in view of the ongoing remediation in the South Valley. We need not go that far." *New Mexico*, 467 F.3d at 1247 (emphasis added). Stated plainly, under *New Mexico*, CERCLA preempts certain uses of remedies, not claims; it is the non-natural resource damage *use* of a natural resource damage recovery (*i.e.*, the *remedy*), and not the claim, that is preempted. In fact, under *New Mexico*, common law claims for the recovery of natural resource damages are not preempted. *Id.* at 1250.

This logic that CERCLA applies to remedies, not claims, has been subsequently confirmed in *Board of County Commissioners of the County of La Plata, Colorado v. Brown Group Retail, Inc.*, 598 F.Supp.2d 1185, 1192-93 (D. Colo. 2009). In that case, the court denied a motion to dismiss an unjust enrichment claim on CERCLA preemption grounds, noting that "[e]ven if the recovery sought [under unjust enrichment] was identical [to that under CERCLA] . . . it is well established that a plaintiff may seek alternative theories of recovery, even when only one of those theories could actually bear fruit at trial. . . . [The Federal Rules and Tenth Circuit authority] allow[] a plaintiff to pursue alternative and legally inconsistent theories up until the point where one of the inconsistent theories prevails to the exclusion of the others." *See also* Fed. R. Civ. P. 8(d)(2).

B. Because they do not admit CERCLA "actually and unquestionably" applies in this action, Defendants cannot establish their affirmative defenses of preemption and displacement, and therefore their Motion for Partial Summary Judgment must be denied in its entirety

This is not the first time Defendants have mounted an attack on the State's claims on the basis of preemption and displacement under *New Mexico*. In December 2006, Defendants brought a similar motion to the one now before the Court. *See* DKT #1004 ("Defendants' Motion for Judgment on the Pleadings in Light of *New Mexico v. General Electric Co.*"). In denying that motion as premature, the Court ruled that:

> . . . I'll parrot the language here from the Southern District of New York case, in light of the fact that defendants have not admitted that CERCLA applies or that the million acre plot of land is a facility as defined by CERCLA, the motion to dismiss is denied with leave to renew.

Ex. 4 (June 15, 2007 Trans., pp. 78-79). Nothing has changed since that ruling on Defendants' motion for judgment on the pleadings. Defendants *still* have not admitted that CERCLA applies. Meanwhile, the CERCLA issues of hazardous substance, release, and facility, while subject to cross-motions for summary judgment, have yet to be resolved. And neither the State nor Defendants (with the exception of the Cargill Defendants) have moved for summary judgment on the issue of arranger liability. As such, there are elements of CERCLA's applicability that are going to have to be determined at trial (*e.g.*, at a minimum the issue of "arranger" liability[5] and, if the State's motion for partial summary judgment is for some reason denied, the issues of "release" and "facility") before it can be definitively said that CERCLA applies in this case. Therefore, it is still premature to determine whether there is any CERCLA preemption or

[5] Whether arranger liability is appropriate for summary judgment consideration is highly suspect. In *Burlington Northern & Santa Fe Railway Co. v. United States*, 2009 U.S. LEXIS 3306, *19 (May 4, 2009), the Supreme Court stated its agreement that whether "arranger" liability attaches "is fact intensive and case specific."

displacement, and if there is any CERCLA preemption or displacement to determine what the scope of that preemption is.

It is beyond any dispute that "[f]ederal preemption is an affirmative defense upon which the defendants bear the burden of proof." *See Emerson v. Kansas City Southern Railway Co.*, 503 F.3d 1126, 1133-34 (10th Cir. 2007) (quoting *Fifth Third Bank ex rel. Trust Officer v. CSX Corp.*, 415 F.3d 741, 745 (7th Cir. 2005)); *see also New Mexico v. General Electric Co.*, 467 F.3d 1223, 1244 (10th Cir. 2006) (noting that CERCLA conflict preemption is an affirmative defense); *Kanne v. Connecticut General Life Insurance Co.*, 867 F.2d 489, 492 fn. 4 (9th Cir. 1988) ("Because Connecticut General's claim of ERISA preemption is a federal defense in this lawsuit, . . . the burden is on the defendant to prove the facts necessary to establish it"). Displacement of the federal common law is likewise an affirmative defense, *see, e.g.*, DKT #1238 (Tyson Defendants Answer to SAC, Aff. Def. ¶ 17); DKT #1239 (Cal-Maine Defendants Answer to SAC, Aff. Def. ¶ 29), which Defendants bear the burden of establishing.

If the statute providing the basis for the claim of preemption or displacement does not apply to the facts in the case at hand, there of course can be no preemption. *See, e.g., Goutanis v. Mutual Group*, 1995 U.S. Dist. LEXIS 2285, *17 (N.D. Ill. Feb. 23, 1995) ("Because ERISA does not apply to the case, there is no preemption . . ."); *Automatic Comfort Corp. v. D & R Service, Inc.*, 627 F. Supp. 783, 784 (D. Conn. 1986) ("[I]t follows that where PMPA [Petroleum Marketing Practices Act] does not apply there is no preemption . . ."); *International Longshoremen's Association Local 1984 v. Alabama State Docks Dept.*, 1993 U.S. Dist. LEXIS 13280, *9 (S.D. Ala. Sept. 7, 1993) ("[S]ince the Federal Railway Labor act does not apply, there is no preemption . . ."). CERCLA simply cannot preempt or displace something to which it does not even apply.

Thus, in the context of a motion for summary judgment the movant -- here, the Defendants -- must establish that the statute providing the basis for the claim of preemption or displacement -- here CERCLA -- *actually* applies to the case at bar. As explained by the Sixth Circuit:

> [T]he basic principles for successfully asserting federal preemption as an affirmative defense on summary judgment are sufficiently clear: it is first incumbent on the party moving for summary judgment to demonstrate that federal preemption potentially applies to the facts and circumstances of the suit, and, if so, the movants must adduce sufficient evidence, interpreted in a light most favorable to the non-moving party, to *prove that there is no genuine issue of material fact contradicting the claim that the case at bar actually and unquestionably qualifies for federal preemption*. The first step presents a purely legal determination, but the second raises a mixed question. Should the movants fail to meet their burden with respect to the latter step, such as *if a genuine issue of material fact exists regarding the claim's actual qualification for federal preemption, the matter must be determined by the factfinder*.

Brown v. Earthboard Sports USA, Inc., 481 F.3d 901, 913 (6th Cir.2007) (emphasis added). Defendants obviously cannot meet their summary judgment burden. At present there is most certainly a genuine issue of material fact "contradicting the claim that the case at bar actually and unquestionably qualifies for federal preemption" or displacement -- namely Defendants' continued denial that CERCLA "actually and unquestionably" applies. Indeed, Defendants continue to vehemently assert that CERCLA *does not* apply. For example, and without limitation: Defendants deny that phosphorus is a "hazardous substance" within the meaning of CERCLA, *see* State's Facts, ¶ 1; Defendants deny that there has been a "release" within the meaning of CERCLA due to the alleged applicability of the "normal application of fertilizer" exception, *see* State's Facts, ¶ 2; Defendants deny being "arrangers" within the meaning of CERCLA, *see* State's Facts, ¶ 3; and Defendants deny that the IRW, as well as the locations where poultry waste has been land applied and otherwise come to be located, are "facilities" within the meaning of CERCLA, *see* State's Facts, ¶ 4.

The elements of a CERCLA natural resource damages claim are that (1) the site is a facility, (2) the defendant is a covered person, (3) the release of a hazardous substance has occurred, and (4) an injury to, destruction of or loss of natural resources resulted from the release of the hazardous substance. *See* 42 U.S.C. § 6907(a); *Coeur D'Alene Tribe v. Asarco, Inc.*, 280 F.Supp.2d, 1102-03 (D. Idaho 2003). Where there is no hazardous substance, no release, no arranger or no facility, CERCLA obviously does not apply. *See, e.g., Sycamore Industrial Park Assocs. v. Ericsson, Inc.*, 546 F.3d 847, 853 (7th Cir. 2008) (where there is no release or threat of release, CERCLA does not apply); *City of Wichita v. Trustees of the Apco Oil Corp. Liquidating Trust*, 306 F. Supp. 2d 1040, 1117 fn 69 (D. Kan. 2003) ("Since they are not covered persons under CERCLA, they cannot be found liable for future costs"). Inasmuch as Defendants still contest the applicability of CERCLA, it will be only after there is judicial resolution of each of these contested matters in favor of the State that the preemption and displacement analyses can and should be undertaken.[6]

In sum, with their Motion, Defendants are trying to have their cake and eat it, too. Contrary to Defendants' assertion -- *an assertion that is unsupported by any citation to applicable caselaw* -- the mere pleading of a claim does not itself trigger preemption or displacement when the very existence of that claim itself is contested. Specifically, *New Mexico* most certainly does not support the proposition that the mere pleading of a CERCLA claim is

[6] In their Motion, p. 5, Defendants cite to *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1172 (9th Cir. 2001), for the proposition that preemption questions should be resolved on summary judgment. Defendants overstate *City of Auburn*. In reaching the preemption question in *City of Auburn*, the court pointed out that "[n]o further factual record would narrow or clarify [the issue of whether certain ordinances were preempted]. As in *Abbott Laboratories*, there is no factual dispute about the activity conducted by Qwest, nor the applicability of the ordinances to its activity. Therefore, the controversy is essentially legal in nature." Obviously, as detailed above, the situation here is just the opposite.

sufficient to trigger CERCLA preemption. While it is true that New Mexico dismissed its CERCLA claim, there was never any dispute as to whether the Court was dealing with a claim to which CERCLA *actually* applied. In fact, as noted above, the South Valley had been designated a CERCLA Superfund site by the EPA well before New Mexico brought its claim. Simply put, in order for there to be the potential for preemption or displacement, there must also be a determination that the statute containing the applicable preemption or displacement provision actually applies.[7] *See, e.g., Varga v. Brown & Williamson Tobacco Corp.*, 1988 U.S. LEXIS 17973, *10-11 (W.D. Mich. Nov. 8, 1988) ("Defendant cannot have it both ways. Either defendant's product falls within the definition of cigarette employed by the statute, in which case both the warning requirements of § 1333 and the [preemption] protections of § 1334 apply to it, or the product does not, in which case neither section applies."); *see also Toole v. Brown & Williamson Tobacco Corp.*, 980 F.Supp. 419, 423 (N.D. Ala. 1997). Defendants' Motion with respect to Counts Four, Five, Six, Ten and the State's request for punitive and exemplary damages must therefore be denied, and the analysis need proceed no further.

C. Defendants cannot establish an "actual conflict" between CERCLA and Counts Four, Six, Ten and the State's request for punitive and exemplary damages and, therefore, Defendants' Motion for Partial Summary Judgment must be denied

Should the Court nevertheless decide to proceed with the analysis, Defendants' Motion should nonetheless still be denied.[8] As Defendants acknowledge with respect to Counts Four,

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[7] In light of the foregoing, Defendants' argument that irrespective of whether CERCLA applies, preemption of the State's state law claims must be considered, *see* Motion, pp. 18-19, is nonsensical. If it were determined that CERCLA is inapplicable, then the issue whether the State's state law remedies are preempted by CERCLA would be moot.

[8] Defendants' apparent suggestion, *see* Motion, p. 20, that the State has "acknowledged" that its natural resource damages claim under CERCLA is time-barred is flatly incorrect and should be rejected. *See* DKT #1913. Moreover, in any event, to the extent that this

Six, Ten and the State's request for exemplary and punitive damages, their Motion turns on the application of principles of conflict preemption to the State's non-CERCLA damages claims. *See* Motion, p. 4. Therefore, determination of the applicability and scope of any CERCLA preemption as to Counts Four, Six, Ten and the State's request for punitive and exemplary damages must be made with reference to principles of conflict preemption.

Conflict preemption occurs where state law "*actually conflicts* with federal law. Thus, the [U.S. Supreme] Court has found pre-emption where [a] it is impossible for a private party to comply with both state and federal requirements, or [b] where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Choate v. Champion Home Builders Co.*, 222 F.3d 788, 792 (10th Cir. 2000) (emphasis added) (reversing district court's grant of summary judgment to defendants on express and implied preemption grounds), quoting *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990). Here, Defendants rely solely on the latter prong.

In order for conflict preemption to apply, there must be an *actual* – and not merely a hypothetical – conflict. *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982) ("The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute."); *English*, 496 U.S. at 79 ("state law is pre-empted to the extent that it *actually* conflicts with federal law") (emphasis added). Furthermore, where a defendant asserts a claim of implied conflict preemption to preclude a state law claim in "fields of traditional state regulation," the United States Supreme Court has made it clear that a finding of preemption is to be less readily

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Court were to find a portion of the State's CERCLA natural resource damages claim to be time-barred, pursuant to the *nullum tempus* doctrine the State could still press those claims under the common law. *Cf. Quapaw Tribe of Oklahoma v. Blue Tee Corp.*, 2009 WL 455260 (N.D. Okla. Feb. 23, 2009).

found. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). "Environmental regulation is an area of traditional state control." *Oxygenated Fuels Ass'n v. Davis*, 331 F.3d 665 (9th Cir. 2003).

1. There is no actual conflict between CERCLA and the State's demand for damages under Counts Four and Six (state law nuisance and trespass)

Under Counts Four and Six, the State seeks injunctive relief, assessment and remediation costs, damages, costs and expenses, exemplary and punitive damages, interest and attorneys fees.[9] *See* SAC, ¶¶ 104-07, 123-26. Citing to 62 Okla. Stat. § 7.1.B, Defendants contend that CERCLA preemption is triggered as to the damages claims because the State is "under no legal restriction as to how any damages, special, punitive or otherwise, must be used . . . ." *See* Motion, p. 13. Defendants' argument must fail, however, because nothing in 62 Okla. Stat. § 7.1 requires the State to use proceeds of a natural resource damages award arising from injuries caused by the release of a hazardous substance in a way inconsistent with the requirements of CERCLA. Therefore, there is no actual, present conflict. Indeed, assuming for purposes of argument that *New Mexico* applies to the instant case, it would only be unless and until the State *actually* were to use such a natural resources damages recovery under Counts Four and Six for purposes inconsistent with the applicable dictates of CERCLA that conflict preemption would be an issue. Such an eventuality has not occurred and may never occur. *See, e.g., Alden v. Maine*, 527 U.S. 706, 755 (U.S. 1999) ("We are unwilling to assume the States will refuse to . . . obey the binding laws of the United States"); *LaFavre v. Kansas*, 6 Fed. Appx. 799, 803 (10th Cir. 2001) (same). Defendants' contentions are therefore unfounded and premature. *Rice*, 458 U.S. at 659 ("The existence of a hypothetical or potential conflict is insufficient to warrant the pre-

[9] As noted above, Defendants do not challenge the State's demand for injunctive relief under these Counts.

emption of the state statute.").[10] Because the only substantive concern identified by Defendants -- *i.e.*, the *potential* use of a CERCLA natural resources damages recovery for purposes inconsistent with the applicable CERCLA natural resources damages law -- does not present a current or actual conflict, conflict preemption does not apply. *See Choate*, 222 F.3d at 792. Therefore, Defendants' Motion for Partial Summary Judgment on the State's demands for damages under Counts Four and Six should be denied.

2. There is no actual conflict between CERCLA and the State's demand for relief under Count Ten (unjust enrichment / restitution / disgorgement)

Defendants next argue that, under *New Mexico*, the State's claim of unjust enrichment, restitution and disgorgement in Count Ten are preempted. *See* Motion, pp. 14-17. Each of Defendants' various arguments that CERCLA preempts State's equitable claim is without merit.

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[10] It should be remembered that CERCLA's savings provisions in 42 U.S.C. §§ 9652(d) and 9614(a) contemplate recovery under state law. Thus there is plainly no actual conflict between the State's common law damages claims and CERCLA, and such claims may proceed. In 42 U.S.C. § 9652(d), Congress unambiguously expressed its intention not to affect or modify the obligations of any party under either state or federal law, including common law, while also negating any policy conclusion that strict liability would not apply to activities relating to the release of hazardous substances, pollutants or contaminants. By explicit legislative declaration, CERCLA does not modify the *obligations* or the *liabilities* under federal or state law, including federal or state common law relating to hazardous substances, pollutants, or contaminants or other such activities. Similarly, 42 U.S.C. § 9614(a) unambiguously states Congress's intention not to preempt a State from imposing any additional *liability* or *requirement* with respect to the release of hazardous substances.

Taken together, these two provisions clearly establish that Congress intended to leave intact other federal and state law, including any applicable common law, with respect to releases of hazardous substances or other pollutants, and unambiguously disclaim any Congressional intent to preempt the State from imposing liability in excess of that imposed by CERCLA. Indeed, in *New Mexico*, the Tenth Circuit explicitly recognized that CERCLA's saving clauses (as well as other provisions) undoubtedly preserve a quantum of state legislative and common law actions and remedies related to the problem of hazardous waste. *New Mexico*, 467 F.3d at 1246, 1246 fn. 33 ("Congress recognized the role of state law in hazardous waste cleanup when it directly addressed the potential overlap of CERCLA and state law in 42 U.S.C. § 9614(b)."); *see also id.* at 1250.

First, as discussed above, *New Mexico* does not require -- and does not permit -- the preemption of a *claim*. *See* 467 F.3d at 1247. Rather, under *New Mexico*, it is the non-natural resource damages *use of a remedy* that may be preempted. *See id.*; *see also Board of County Commissioners of the County of La Plata, Colorado*, 598 F.Supp.2d at 1192-93 (denying motion to dismiss unjust enrichment claim on CERCLA preemption grounds, noting that "[e]ven if the recovery sought [under unjust enrichment] was identical [to that under CERCLA] . . . it is well established that a plaintiff may seek alternative theories of recovery, even when only one of those theories could actually bear fruit at trial. . . . [The Federal Rules and Tenth Circuit authority] allow[] a plaintiff to pursue alternative and legally inconsistent theories up until the point where one of the inconsistent theories prevails to the exclusion of the others.").

Second, Defendants do not identify how State's equitable *remedy* creates an actual conflict with CERCLA -- the prerequisite for any conflict preemption. Instead, Defendants simply raise the same flawed hypothetical argument -- that such a recovery might be used for purposes inconsistent with the applicable dictates of CERCLA -- that the State thoroughly debunked in the previous section. *See, supra*, Section V.C.1.

Third, Defendants' reliance on *New Mexico* is further misplaced, as the plaintiff in *New Mexico* did not assert any equitable theories. Indeed, Defendants admit that "*New Mexico* did not specifically discuss unjust enrichment, restitution, and disgorgement . . . ." *See* Motion, p. 15. Thus, *New Mexico* does not stand for the proposition that CERCLA preempts a plaintiff's equitable claim.

Fourth, Defendants' assertion that the State's unjust enrichment claim "would raise the *potential* of a prohibited double recovery," *see* Motion, p. 16 (emphasis added), does not stand up to scrutiny. By its express terms, 42 U.S.C. § 9614(b) of CERCLA forbids any double

recovery that might result as a result of the prosecution of a state law claim (including a common law or equitable claim) preserved pursuant to the CERCLA savings clauses found in 42 U.S.C. §§ 9652(d) and 9614(a). Section 9614(b) provides that:

> Any person who receives compensation for removal costs or damages or claims pursuant to this chapter shall be precluded from recovering compensation for the same removal costs or damages or claims pursuant to any other State or Federal law. *Any person who receives compensation for removal costs or damages or claims pursuant to any other Federal or State law shall be precluded from receiving compensation for the same removal costs or damages or claims as provided in this chapter.*

(Emphasis added.) Furthermore, 42 U.S.C. § 9607(f)(1) provides in part: "There shall be no double recovery under this chapter for natural resource damages, including the costs of damage assessment or restoration, rehabilitation, or acquisition for the same release and natural resource." Simply stated, as pertains here, any amounts received as compensation pursuant to CERCLA for natural resource damages may not also be recovered for the same natural resource damages pursuant to any other federal or state law; conversely, any amounts received as compensation for natural resource damages pursuant to any other federal or state law may not be recovered for the same natural resource damages under CERCLA. Thus, double recoveries are prohibited under the express terms of CERCLA.[11]

Likewise, Oklahoma law prohibits double recoveries. *See Carris v. John R. Thomas & Assoc.*, 896 P.2d 522, 530 (Okla. 1995); *Tate v. Browning-Ferris, Inc.*, 833 P.2d 1218, 1223 (Okla. 1992).

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[11] Significantly, the existence of provisions such as 42 U.S.C. §§ 9607(f)(1) and 9614(b) underscore the fact that state law claims for natural resource damages are intended to coexist with CERCLA's natural resource damages provisions. These provisions would be unnecessary surplusage if, contrary to the provisions of 42 U.S.C. §§ 9614(a) and 9652(d), CERCLA preempted natural resource damage claims under other federal or state law. Without a clear congressional command otherwise, a statute cannot be construed in a manner that renders some of its provisions surplusage. *See New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985). These provisions create a unified Congressionally mandated whole, in which other sources of federal and state liability are left intact, and double recoveries are prohibited.

Moreover, the Tenth Circuit in *New Mexico* did not hold that dismissing a demand for damages under an alternative or complementary state law theory is an appropriate tool to avoid the potential for a double recovery. Instead, the Tenth Circuit has previously instructed that "[w]here a jury award duplicates damages, the court, either sua sponte or on motion of a party, should reduce the judgment by the amount of the duplication. . . . The question of whether damage awards are duplicative is one of fact . . . ." *Mason v. Oklahoma Turnpike Auth.*, 115 F.3d 1442, 1459 (10th Cir. 1997) (reversing district court's requiring plaintiff to elect single punitive damage award against defendant).

Thus, not only are Defendants' concerns regarding any double recovery adequately protected under CERCLA, Oklahoma law, and this Court's authority to prevent a double recovery following a jury verdict, but also Defendants' fears are premature. *New York v. Hickey's Carting, Inc.*, 380 F. Supp. 2d 108, 116 (E.D.N.Y. 2005) (rejecting as premature defendants' argument that "the potential for Plaintiff's double recovery warrants dismissal of its common law claims").

Fifth and finally, an award under the State's unjust enrichment / restitution / disgorgement theories that compensates the State for CERCLA injuries to its natural resources is entirely consistent with CERCLA's savings clauses. *See* 42 U.S.C. §§ 9614(a) & 9652(d).

Based on the foregoing, Defendants' Motion for Summary Judgment as to Count Ten should be denied.

3. There is no actual conflict between CERCLA and the State's demand for exemplary and punitive damages

Defendants' next argument -- that CERCLA preempts the State's demand for exemplary and punitive damages -- also fails on multiple levels.[12] First, Defendants again fail to identify how permitting the State to pursue its request for punitive and exemplary damages under state law creates an *actual* conflict with Congress's purpose in CERCLA -- a required showing under a conflict preemption analysis. *See, supra*, Section V.C. There is simply no indication that an award of punitive damages would hinder any remedial action ultimately ordered. Until that time, any purported conflict is only hypothetical and does not warrant preemption. *Rice*, 458 U.S. at 659 ("The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute.").

Second, there is no suggestion in CERCLA's savings clauses in 42 U.S.C. §§ 9614(a) and 9652(d), that Congress intended to abrogate a plaintiff's ability *under state law* to recover punitive damages. Section 9614(a) is particularly poignant on this issue: "Nothing in this chapter shall be construed or interpreted as preempting any State from imposing *any additional liability or requirements* with respect to the release of hazardous substances within such State." 42 U.S.C. § 9614(a) (emphasis added).

Third, Defendants' statement that "[u]nder CERCLA, punitive damages are authorized only in very limited circumstances which are not present in this case and which are specifically designed to accomplish the goal of compliance with the EPA's cleanup decisions," *see* Motion, p. 18, is a red herring, because the State does not seek punitive and exemplary damages pursuant to

[12] In their Motion, p. 2, Defendants cite to a comment made by the Court at the very opening of the hearing on Defendants' motions to dismiss and before oral argument that "it *seems* if CERCLA does apply, that punitive damages are out, that attorney fees are questionable, that federal common law is out." *See* Ex. 5 (6/14/07 Hrg. Trans., p. 6) (emphasis added). However, as the Court stated on that very same page of the transcript, "I like oral argument because a lot of matters are clarified in oral argument." The State submits that further argument on these issues will make clear to the Court that CERCLA does not impact the State's federal common law nuisance claim, the State's claims for punitive damages, or attorneys fees.

CERCLA, but rather under state law.

And fourth, contrary to Defendants' assertion and as explained above, CERCLA does not extinguish the State's common law claims for damages. *See New Mexico*, 467 F.3d at 1247 (CERCLA preempts certain uses of remedies, not claims). Indeed, CERCLA's savings clauses make it clear that compensatory damages may be awarded under state law theories, and even if such compensatory damages were restricted to be used for CERCLA's natural resource damages purposes, those compensatory damages could form the predicate for an award of punitive damages under state law.[13]

In sum, Defendants have failed to establish that there is an actual conflict between CERCLA and the State's demand for exemplary and punitive damages. Therefore, summary judgment must be denied.

D. Defendants cannot establish that CERCLA displaces the federal common law of nuisance, and, therefore, Defendants' Motion for Summary Judgment as to Count 5 must be denied

As a final matter, Defendants seek summary judgment on the State's *entire* federal common law nuisance claim, arguing that it has been displaced by CERCLA's natural resource damages remedy. *See* Motion, pp. 21-23. As discussed below, Defendants' argument is unavailing against the principles that govern a federal statute's displacement of a federal common law claim. Because Defendants cannot satisfy such principles, Defendants' Motion regarding Count Five (federal common law nuisance) should be denied.

As an initial matter, "the appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is not the same as that

[13] Because the State's compensatory damages demands under Counts Four and Six are not preempted, *see, supra,* Section V.C.1, such a vehicle for punitive damages exists in this case.

employed in deciding if federal law pre-empts state law." *City of Milwaukee v. Illinois*, 451 U.S. 304, 316 (1981). "[L]ongstanding is the principle that statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident. *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 [(1952)]." *United States v. Texas*, 507 U.S. 529, 534 (1993) (internal quotation marks omitted). The Supreme Court went on to state: "In such cases, Congress does not write upon a clean state. . . . In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *Id.* (citations omitted). Although "Congress need not 'affirmatively proscribe' the common-law doctrine at issue . . . courts may take it as a given that Congress has legislated with an expectation that the common law principle will apply except when a statutory purpose to the contrary is evident." *Id.* Notably, the question in determining whether a federal statute displaces federal common law is whether Congress has occupied the field. *Milwaukee*, 451 U.S. at 324.

Here, to show CERCLA's purported displacement of the State's federal common law nuisance claim, Defendants must overcome the presumption favoring the retention of federal common law and demonstrate that Congress intended to preclude environmental plaintiffs from asserting a federal common law nuisance claim by enactment of CERCLA. Defendants' arguments are wholly unpersuasive.

First, Defendants' assertions, as quoted above, that CERCLA displaced otherwise available federal common law causes of action is directly contrary to the clear language of CERCLA's savings provision in 42 U.S.C. § 9652(d). As pointed out previously, CERCLA expressly provides that "*[n]othing in this chapter* [i.e., CERCLA] shall affect or modify in any way the obligations or liabilities of any person *under other Federal* or State *law, including*

common law, with respect to releases of hazardous substances or other pollutants or contaminants. . . ." 42 U.S.C. § 9652(d) (emphasis added). By its express terms, CERCLA contemplates not the *displacement* of, but the *availability* of federal common law remedies to serve as a complement to CERCLA's provisions. Defendants' assertion that any federal common law cause of action that could have existed before CERCLA's enactment has been displaced by CERCLA's statutory and regulatory terms flies directly in the face of 42 U.S.C. § 9652(d).

Second, as stated above, the question in determining whether a federal statute displaces federal common law is whether Congress has occupied the field. *Milwaukee*, 451 U.S. at 324. In this regard, it is well settled that Congress did not intend to occupy the field in enacting CERCLA. *See, e.g., New Mexico*, 467 F.3d at 1244; *United States v. City & County of Denver*, 100 F.3d 1509, 1512 (10th Cir. 1996) (CERCLA preemption analysis implicates conflict preemption, not field preemption); *ARCO Envtl. Remediation, LLC v. Dep't of Health & Envtl. Quality*, 213 F.3d 1108, 1114 (9th Cir. 2000) (based on savings provisions, court held that "CERCLA does not completely occupy the field of environmental regulation"); *Manor Care, Inc. v. Yaskin*, 950 F.2d 122, 125-26 (3d Cir. 1991). Indeed, Defendants utterly fail to reconcile the holding in *New Mexico* -- namely that CERCLA is concerned with the *uses of remedies* and not the claims leading to those remedies -- with the argument they are advancing here.

Third, Defendants do not attempt to explain how, and offer no support for the proposition that, CERCLA displaces the injunctive component of the State's federal common law nuisance claim. *See New York v. Shore Realty Corp.*, 759 F.2d 1032, 1049-52 (2d Cir. 1985) (upholding state public nuisance suit for injunctive relief where CERCLA failed to provide such relief), *cited in New Mexico*, 467 F.3d at 1246.

Finally, none of the three cases that Defendants cite in support of their displacement

argument -- *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981), *Milwaukee*, 451 U.S. at 313-14, and *New Mexico*, 467 F.3d 1223 -- involved the question of CERCLA's displacement of federal common law. First, *Texas Industries* and *Milwaukee* did not involve, let alone mention, CERCLA. Second, the plaintiff in *New Mexico* did not assert any federal common law causes of action and, therefore, the Tenth Circuit did not opine on CERCLA's displacement, if any, of federal common law. Simply put, none of the cases cited by Defendants has any bearing on the question of whether Congress intended through CERCLA to displace the availability of a federal common law nuisance claim.

In sum, Defendants have pointed to no authority to overcome the presumption that Congress did not intend to displace otherwise applicable federal common law when it enacted CERCLA. To the contrary, Congress expressed its intent in CERCLA's savings provision to preserve -- and not to displace -- "the obligations or liabilities of any person *under other Federal* or State *law, including common law*, with respect to releases of hazardous substances or other pollutants or contaminants. . . ." 42 U.S.C. § 9652(d) (emphasis added). Accordingly, Defendants' Motion for Partial Summary Judgment as to Count Five should be denied.

VI. Conclusion

WHEREFORE, in light of the foregoing, "Defendants' Joint Motion for Partial Summary Judgment on Plaintiff's Damages Claims Preempted or Displaced by CERCLA [DKT #2031]" be denied in its entirety.

Respectfully submitted,

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